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TRUSTS AND ESTATES UPDATE

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Legislative Highlights and Decisions of Interest

Since my last article in May, the area of trusts and estates has seen some important developments as a result of actions taken by the New York State Legislature. In particular, legislative review has been directed to bills affecting attorney-fiduciaries, non-marital children, forfeiture, and posthumous DNA test results. Given the significance of this legislation to Surrogate's Court practice, it will serve as the focal point of this month's article.

Additionally, well-deserved comment this month will be given to several interesting decisions which have been rendered.

Legislation Affecting Estate Practitioners

SCPA 2307-a: Acknowledgment of Disclosure: Senate Bill 6986/Assembly Bill 11127: the proposed Bill clarifies the disclosure requirements regarding commissions to attorney-executors.

SCPA 2307-a was signed into law in August 1995 in response to a series of decisions rendered by surrogates throughout the state addressed to perceived attorney-overreaching in circumstances where an attorney is nominated to serve as executor in a will which he/she drafted. In its present form, SCPA 2307-a provides in substance that attorneys who are named as executors in wills that they or anyone affiliated with them have prepared must disclose to the testator prior to the execution of the will that:

(1) subject to the limited statutory exceptions, any person, including an attorney, is eligible to serve as executor;

(2) absent an agreement to the contrary, such person, including an attorney, will receive a statutory commission for serving as executor; and

(3) if any attorney serves as an executor, such attorney is entitled to legal fees and commissions for services performed.

Since the enactment of SCPA 2307-a, disagreement among surrogates arose with respect to the statutory language, particularly in regard to the meaning of the words "concurrently with" as utilized in connection with the disclosure requirement. In *Matter of Pacanofsky and Hinkson*, 186 Misc2d 15 (2000), Surrogate Roth held that the disclosure required by theprovisions of SCPA 2307-a could not be satisfied through a statement incorporated in the will itself. Similarly, in *Matter of Bruder*, New York Law Journal, March 15, 2001, p.25 (Surrogate's Court, Nassau County), Surrogate Riordan held that the statutory requirement of disclosure must be in the form of a separate writing. On the other hand, in *Matter of Winston*, 186 Misc2d 332 (2000), Surrogate Holzman concluded that the disclosure made in the will of the decedent sufficiently complied with the statutory prescription of SCPA 2307-a so as to entitle the named executor to a full commission. The court held that the purpose of the disclosure statement required by SCPA 2307-a was to focus upon the substance of the disclosure rather than the vehicle by which disclosure was made.

In order to clarify the issues raised by the foregoing decisions and to promote the concerns underlying the provisions of SCPA 2307-a, a statutory amendment is pending which would require that the written acknowledgment of disclosure be in a form "separate from the will, which may be annexed to the will, and which may be executed prior to, concurrently with, or subsequently to a will…"

The Bill passed the Senate on May 4, 2004, and the Assembly on May 20, 2004, and is awaiting signature by the Governor.

Afterborn Children, DNA

EPTL 5-3.2: Afterborn Children: Senate Bill 6989/Assembly Bill 11126: the proposed Bill recognizes the holding and commentary of the Surrogate of New York County (Roth, J.) and the former Surrogate of Nassau County (Radigan J.), respecting the right of a non-marital child to inherit as an afterborn child from the estate of his/her deceased father,

In *Matter of Wilkins*, 180 Misc2d 568 (1999), Surrogate Roth held that a non-marital child, who establishes his/her status pursuant to EPTL 4-1.2(a)(2)(C), could inherit as an afterborn pursuant to the provisions of EPTL 5-3.2. Although the court described the issue as a novel one which had not been addressed by statute, it determined that the trend in the law was to treat non-marital children in pari materia with legitimate children.

Approximately one year prior to Surrogate Roth's opinion, Surrogate Radigan decided *In re Estate of Walsh*, NYLJ, May 13, 1998 (Surrogate's Court, Nassau County), a case which, in pertinent part, also addressed the issue as to whether a non-marital child could inherit as an afterborn pursuant to EPTL 5-3.2. Recognizing the case as one of first impression, Surrogate Radigan opined that the "legislative intent of EPTL Section 5-3.2 and EPTL Section 4-1.2 might allow a non-marital child born and acknowledged as the child of the decedent after the execution of a will, to be treated as an afterborn child."

Based upon the foregoing, legislation has been proposed and is currently pending which would amend the provisions of EPTL 5-3.2 in order to include a non-marital child as an afterborn child of his/her father where paternity is established pursuant to the provisions of EPTL 4-1.2.

The Bill passed the Assembly on May 20, 2004.

EPTL 4-1.2(a)(2)(D): Establishing paternity through posthumous DNA testing: Senate Bill 6990/Assembly Bill 2850-A: the proposed Bill would authorize the use of posthumously obtained DNA test results to establish paternity.

This Bill has been pending for several years and essentially recognizes the scientific accuracy of DNA test results obtained after death, something which the statute, in its present form, fails to recognize. Since this proposed legislation was approved by the Executive Committees of the Trusts and Estates Section and the New York State Bar Association, surrogates throughout the metropolitan area have sustained the reliability

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of DNA testing and urged clarification of the statute with regard to the instances in which DNA test results are admissible into evidence and the weight they are to be accorded in estate proceedings. See *In re Estate of Bonnanno*, NYLJ, April 22,2002 (Surrogate's Court, New York County, Surrogate Eve Preminger); *In re Estate of Santos*, NYLJ, July 28, 2003 (Surrogate's Court, Kings County, Surrogate Michael Feinberg)

The proposed legislation would amend the provisions of EPTL 4-1.2(a)(2)(D) to allow paternity to be established through the results obtained from a genetic blood marker test administered to the father during his lifetime or posthumously.

The Bill passed the Senate on June 9, 2004.

Disqualification and Abuse

EPTL 4-1.4: Disqualification of a parent on the grounds of abuse: Senate Bill 6988: the proposed Bill would disqualify an abusive parent from taking an intestate share of his/her child's estate.

A review of the statute and the relevant cases as they presently stand reveals a gap in the law to the extent that a parent is allowed to take an intestate share from his/her child even when, in the most extreme cases, the child has been permanently removed from the home due to continued abuse. Only when the child is actually adopted by another family does the EPTL call for the termination of the inheritance rights of the natural parent.

The proposed legislation is designed to eliminate "rewarding" an abusive parent with inheritance rights, and to possibly afford children additional protection from abuse. It would apply in situations where parental rights have been permanently terminated, and in instances where a child has died during a period of suspended judgment.

The Bill passed the Senate on May 10, 2004.

Decisions of Interest

Costs on Appeal: In a contested accounting proceeding, the executor of the estate submitted a proposed supplemental decree to the court which, inter alia, sought to assess the costs of an appeal against the decedent's surviving spouse, who was a beneficiary of the estate. These costs included legal fees and disbursements. The application was opposed by the surviving spouse.

The Appellate Division had, in its Order on appeal, directed that "costs be paid by the appellant personally." The appellant/surviving spouse argued that this language did not authorize the court to assess the legal fees of the appeal against her. The court disagreed, holding that this language has been interpreted to indicate the appellate court's deferral of the issue of fees to the surrogate's court. In support of this conclusion, the court cited the provisions of SCPA 2302(5), which specifically authorizes the court, after appeal, to award a fiduciary "such sum as it deems reasonable for counsel fees and other expenses necessarily incurred on appeal."

It further noted that this result comported with the unique role played by the surrogate's court in supervising the administration of an estate, and in particular, its inherent authority to fix legal fees. The court opined that the general rule prohibiting fees from being assessed against the distributive share of an estate beneficiary do not apply with respect to fees incurred on appeal. See e.g. *Matter of Scuderi*, NYLJ, Aug. 10, 1998 (Surrogate's Court, Nassau County)

Accordingly, the court found that counsel for the executor was entitled to fees for services rendered on appeal, and directed that they be paid by the surviving spouse personally.

***In re Estate of Lucia*, NYLJ, March 17, 2004, (Surrogate's Court, Nassau County, Surr. John B. Riordan)**

Protective Order: In a contested probate proceeding, a brother of the decedent and a nonparty witness moved to quash a subpoena and subpoena duces tecum, and for the issuance of a protective order pursuant to CPLR 3103.

In support of the motion, the nonparty witness submitted an affidavit of his psychiatrist which described him as an 88 year old suffering from depression and severe anxiety disorder, and concluded that if he were forced to testify in court or at home it would precipitate a "major decompensation which would be life threatening." However, two earlier letters from this same psychiatrist made no mention of a possible life threatening situation to the witness but did mention a "major decompensation" if he were to be deposed. In addition, the witness' own affidavit merely stated that the deposition would be emotionally taxing and possibly dangerous to his health and well-being.

In assessing the propriety of the relief, the court indicated that the proponent of a motion for a protective order must make an appropriate showing that he/she is entitled to such relief. Generally, under such circumstances, the court must balance the general preference for allowing discovery against the objecting party's prerogative to be free from unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.

Insofar as the relevance of the deposition was concerned, the court concluded, upon review of the record, that the requested examination would provide information which would be "material and necessary" to the objectants' case.

Turning next to the question of whether the deposition should proceed, the court examined the sufficiency of the medical evidence submitted. The court noted that in a number of cases granting a protective order for health reasons, the medical evidence is "uncontradicted." However, in the case before it, the court found that the objectants had no opportunity to challenge the conclusions drawn by the witness' doctor, as to his claims that a deposition would be "life threatening." Moreover, on the present state of the record, the court concluded that it could not ascertain whether this conclusion was true without further inquiry. "The opposing party has the right on behalf of itself and on behalf of the court to examine the matter in more detail."

Accordingly, the motion for a protective order was held in abeyance, and the objectants were authorized to select a physician of their choosing to consult with the nonparty witness' physician, and to review his medical records and examine the witness if necessary. Additionally, the court urged counsel to come to terms as to the manner in which the deposition of the witness should be conducted, short of written questions. Notably, in this latter regard, the court opined that written questions are not as conducive to an examination as oral questions, in that the former does not permit the probing follow-up questions necessary in most depositions, does not permit the examiner to observe the demeanor of the witness and evaluate his credibility during the course of questioning, and is often the result of a joint effort between the witness and his counsel.

***In re Estate of Martin*, NYLJ, April 8, 2004, p. 32 (Surrogate's Court, Nassau County, Surr. John B. Riordan)**

SCPA 1411 Citations and Relief From Default: In a contested probate proceeding, the court denied a motion to strike the objections of an alleged distributee and the guardian ad litem on the grounds that they were not timely filed.

The record revealed that on the original return date of citation, examinations pursuant to SCPA 1404 were requested, and counsel for the petitioners, counsel for one of the distributees, and the guardian ad litem stipulated as to the date of the examinations and the time by which objections were to be filed. The distributee timely filed his objections, and a citation issued pursuant to SCPA 1411 to the respondent/distributee and the guardian ad litem. On the return date of the 1411 citation, the respondent/distributee appeared for the first time by counsel and filed objections to probate. Thereafter objections to probate were filed by the guardian ad litem.

As a consequence, petitioners moved to strike the objections on the grounds of untimeliness. The court denied the motion, finding that the respondent/distributee and the guardian ad litem had established "reasonable cause" for the delay, as well as a lack of prejudice to petitioners or any other party. Specifically, the court credited respondent's allegations regarding her inability to appear in the proceeding or retain New York counsel until she was served with the SCPA 1411 citation, which occurred after the stipulated deadline for filing objections. Additionally, the court accepted the guardian ad litem's allegations that he was unable to complete his objections until his review of the medical records. Finally, the court noted that the objections were virtually identical to those which were timely filed, and therefore no prejudice was apparent.

***In re Estate of Bauer*, File No. 2147/01, Decided April 27, 2004 (Surrogate's Court, Westchester County)**